84-678

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. J. WOLF, PETITIONER,

vs.

BANCO NACIONAL DE MEXICO, S.A., RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Petitioner and Counsel

60 pp

QUESTION PRESENTED:

Are the deposit instruments of foreign banks, advertised and offered publicly in the United States as attractive investments, sold through the mails to United States citizens, and unregulated by United States banking laws, securities within the meaning of the Securities Act of 1933?

PARTIES TO THE PROCEEDING

In addition to R. J. Wolf and Banco Nacional de Mexico, S. A., the following appeared as amici curiae in the Ninth Circuit Court of Appeals:

Securities and Exchange Commission

Federal Deposit Insurance Corporation

Institute of Foreign Bankers

Mexican Banking and Financial Institutions and Organismo de Coordinacion de la Banca Mexicana

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JURISDICTION

The date and time of entry of the judgment sought to be reviewed was August 10, 1984.

A timely petition for rehearing en banc was filed August 23, 1984; the date of the order denying rehearing was October 18, 1984.

The statute conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Securities Act of 1933, 15 U.S.C. §77b, provides,

> When used in this subchapter, unless the context otherwise requires --
>
> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §77e provides,

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly -
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transporation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. §77l provides,

> Any person who -
>
> (1) offers or sells a security in violation of section 77e of this title, or
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material

fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

STATEMENT OF THE CASE

In 1981 Wolf read certain advertisements in California newspapers placed by Banco Nacional de Mexico, S.A. (Banamex) and offering "investment opportunities" in its "fixed term peso accounts". Wolf wrote Banamex asking for further information and received in reply a brochure describing the various "investment opportunities", and an application form should Wolf "decide to invest".

The brochure entitled "Mexico's Other Great Climate ... Investment" explains:

> "The information contained in this brochure is designed to help you decide on the investment most suited to your needs. However, should you require any further details please ... write to: Securities Promotion, Isabel La Catolica 44, Mezzanine, Mexico 1, D.F., Mexico ...
>
> You will find for your convenience an insertion at the back of this brochure containing a list of Time Deposit Investment opportunities

and details of current legal stipulations covering such investments. Reading the accompanying information will help you select the investments most suited to your needs ...

For persons residing outside of Mexico the following procedure applies: Provide Banamex in writing with the following: 1). Amount you wish to invest by type of investment. 2). Enclose bank draft, personal check or cashier's check covering amount of investment(s). Checks made out to the order of Banco Nacional de Mexico, S. A. (BANAMEX) preferably in U. S. dollars or Mexican pesos. Checks sent in U. S. dollars or other currencies for investments in Mexican pesos will be converted into Mexican pesos at the rate of exchange prevailing in the Mexican money market on the day your check is received. 3). Name or joint names in which the account is to be opened, and type of account. 4). Instructions on payments of interests ...

For further investments, simply send your instructions along with your account number and covering check ...

Mexico has no exchange controls which means your interest and principal can be remitted to you freely and without hindrance, in the currency of your choice. The Mexican peso, like the U. S. dollar, is a floating currency which means that the rate of exchange between the peso and the currency you request your interests and principal to be paid to you in could vary upwards or downwards between the time you purchase your Time Deposit and

> maturity. However, since 1977 the Banco de Mexico, Mexico's Central Bank, has maintained a stable peso-dollar parity by intervening in the money market ... "

Thereafter Wolf mailed a total of $60,000. to Banamex in Tijuana for investments in one six-month and two three-month accounts, to pay him net interest returns of 33.9%, 31.4% and 32.75% respectively, to be remitted monthly, by mail, in dollars. The investments were evidenced by uninsured, non-negotiable, non-withdrawable deposit receipts.

In February 1982 prior to the maturity of these investments, the Banco de Mexico ceased its intervention in the money market and the exchange value of the peso declined dramatically. Upon maturity Banamex redeemed the three investments for a total of $35,536. -- $24,464. less than their original value.

Wolf sued claiming Banamex had omitted material facts in its brochure misleading him in violation of Sections 12(2) and 17 (a)(2) of the Securities Act of 1933, 15 U.S.C.§§771(2) and 77q(a)(2); and that Banamex had sold him unregistered securities in violation of Section 12(1) of the Securities Act of 1933, 15 U.S.C.§771(1).

Specifically Wolf claimed the brochure should have included the following material facts of which he was unaware:

> "(a) That the Mexican peso, in fact required continuing, active support by the Mexican Federal Reserve in order to maintain its parity with the United States dollar.
>
> (b) That the Banco de Mexico would not necessarily continue to intervene in the Mexican money market in order to maintain a stable peso-dollar parity.
>
> (c) That the Banco de Mexico was not obliged by custom or practice to main- a stable peso-dollar parity by intervening in the Mexican money market or otherwise.
>
> (d) That in the event the Banco de

Mexico ceased its intervention in the Mexican money market to support the peso that currency would decline in value dramatically as compared to the dollar.

(e) That any substantial decline in value of the peso to the dollar from the time of deposit until maturity would cause substantial loss of the deposit itself.

(f) That even a slight decline in value of the peso to the dollar from the time of deposit until maturity could eliminate entirely all net return on the deposit.

(g) That the rate of interest payable monthly would be based upon the then current rate of exchange between the peso and the dollar rather than the rate of exchange at the time of deposit.

(h) That the deposit would be reconverted into dollars at the rate of exchange prevailing on the date of maturity.

(i) That all monthly statements would be in Spanish, not English.

(j) That a time deposit in pesos was, in fact, highly speculative if not dangerous."

Had those facts been disclosed, Wolf would have made no investments in Banamex time deposits.

Wolf had no prior knowledge of the possible devaluation of the peso. Although Banamex claimed to have no actual knowledge the peso would be devalued, it produced in the district court previously published information to that effect, and the Chairman of its Board of Directors was a member of the Advisory Board of the Banco de Mexico at and prior to the time it decided to and did withdraw its support of the peso.

The district court never reached the claims of omission, misrepresentation and fraud. On cross-motions for summary judgment it held dispositive that these deposit instruments were securities, and that Banamex was strictly liable to Wolf for damages under Section 12(1) of the Securities Act of 1933, 15 U.S.C. §771(1), for having failed to register them (549 F. Supp. 841; appx. p. 25).

Banamex's first appeal was dismissed because the judgment entered was not final, 721 F.2d 660; appx. p. 74. On remand, the district court granted Banamex's motion to certify the securities question,

> Defendant's motion to certify pursuant to 28 U.S.C. §1292(b) is granted. The issue whether the peso accounts are securities clearly involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation since reversal of this Court's order would end it. (appx. p. 82);

and the Court of Appeals granted permission to appeal, appx. p. 84.

First observing,

> As the district court noted, no other court has resolved the question of whether a certificate of deposit issued by a foreign bank is a security within the federal securities acts,

appx. p. 9, the Court of Appeals reversed the district court and held that the deposit instruments were not securities, 739 F.2d 1458; appx. p. 1.

ARGUMENT

The Court of Appeals has decided whether the deposit instruments here are securities in a way that conflicts with applicable decisions of this Court.

Concededly eschewing all other tests for defining a security, that court said,

> ... when the Supreme Court, in Marine Bank v. Weaver [455 U.S. 551 (1982)], has so recently applied the definition [of a security] to facts very similar to those in the case before us, we are bound by its reasoning there, to the exclusion of criteria articulated in other contexts. (appx. pp. 10, 11).

But other than the fact both involve instruments issued by banks, there is no similarity between the instant case and Weaver; the reasoning of Weaver does not apply here; and the criteria articulated by this Court in Weaver and prior decisions demand that the deposit instruments at issue be held securities.

Weaver held that an ordinary certificate of deposit, issued by a federally regulated domestic bank, and insured against loss by the FDIC, was not a security for purposes of the antifraud provisions of the federal securities laws, specifically under Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10). Weaver explained,

> This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation ... We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency. ... It is unnecessary to subject

> issuers of bank certificates of deposit to liability under the antrfraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. 455 U. S. at 558.

Addressing the separate agreement between the Weavers and the Piccirillos, this Court reminded,

> The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case. In Howey, for example, 42 persons purchased interests in a citrus grove during a four-month period. 328 U. S., at 295. In C. M. Joiner Leasing, offers to sell oil leases were sent to over 1,000 prospects. 320 U. S. at 346 ... Here, in contrast, the Piccirillos distributed no prospectus to the Weavers or to other potential investors ... 455 U. S. at 559, 560.

Weaver concluded,

> It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. 455 U. S. at 560, note 11.

Assuming that the mere existence of Mexican bank regulation was sufficient under Weaver to remove the instant transaction from the parameters of the federal securities laws, the Court of Appeals ignored Weaver's admonition that

> [e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. (note 11)

Thereby, the Court of Appeals failed to apprehend the critical distinctions between a domestic certificate of deposit and the instruments in question here: Unlike a domestic certificate of deposit, Wolf had neither dominion nor control over his deposit-investments, only receipts; they were non-negotiable; they could not be pledged, mortgaged, assigned, borrowed-against; and they were not withdrawable prior to maturity by acceptance of an interest penalty or otherwise. Thus, Wolf

was prevented from mitigating any losses he might sustain in the event of the continuing decline in the exchange value of his deposit-investment by the very same Mexican bank regulation the Court of Appeals found provided him

> with protection equivalent to that afforded depositors in the federally regulated Marine bank.

739 F.2d at 1464; appx. p. 24.

Unlike a domestic certificate of deposit, Wolf's "deposits" were not insured against loss of any kind, not even against insolvency for Mexican bank regulation does not provide for deposit insurance. Therefore, unlike Weaver, Wolf did in fact assume the risk of Banamex's insolvency.

The Court of Appeals found Mexican bank regulation provided Wolf

> the same degree of protection against insolvency as does the federal system in this country,

(739 F.2d at 1463; appx. pp. 22) because

> Banamex ... is supervised ... must adhere to paid-in capital and reserve requirements, and its advertising is subject to ... approval ... It is required to publish monthly financial statements ... for approval ... [and is] audit[ed] ... annually. Although there was ... no deposit insurance program, no Mexican bank has failed in the past 50 years. In the event of such a failure ... certificates of deposit, by law would constitute preferential claims against all other obligations.

739 F.2d at 1463; appx. p. 23. Those observations were repeated almost ver batim from a conclusionary declaration by Banamex's agent-for-service-of-process, the only support in the record for them. At least one is contrary to law. Mexico's Law of Bankruptcy and Suspension of Payments Article 437 provides, "The plan of preference shall be subject to the following order:" 1) taxes; 2) creditors of the bankrupt estate; 3) liquidation expenses; 4) creditors with collateral; 5) fiscal assessments for taxes; 6) labor claims;

7) savings account creditors; 8) demand or time deposit account creditors; 9) bond creditors; 10) general creditors. Thus, in the event of a Mexican bank's failure, certificates of deposit would not "constitute preferential claims against all other obligations"; instead, they would be eighth in line.

Nor, even if it were true, is the prior lack of bank failure any protection against the risk of bank failure -- a risk Wolf in fact assumed when he made his investments.

> [T]he nature of an instrument is to be determined at the time of its issuance, not at some subsequent time.

Great Western Bank & Trust v. Kotz, 532 F.2d 1252 (CA9 1976).

Reserve, reporting and inspection requirements appear in the banking laws of most, if not all nations; they are modeled after one another. Their mere existence, however,

is no guaranty of their past, or future, enforcement, nor of their efficacy. It is a matter of fact that during the relevant times here, a very considerable portion of the deposits in Banamex and other large Mexican banks was no longer in Mexico at all but was instead "invested" abroad, and that this flight of capital posing a very real and imminent threat to the safety of depositors and the value of their deposits, impelled the nationalization of Mexico's banks.

> That the private investors to which have been concessioned the services of banking and credit in general have obtained increasing profits from the exploitation of these services, creating in addition in their interest, monopolistic phenomena with money derived from the public in general, which must be avoided in order to administer the resources so obtained for the general interest and for the social diversification of credit in order that it reaches the greater part of the productive public and does not continue to be concentrated in the hands of the most favored levels of society; ...
>
> That with the objective that the

> Mexican people, who had delivered with their money and assets to the banks for the administration and custody thereof, has created an economic structure which such banks now have, do not suffer any detriment and may continue to receive this important public service and with the purpose that their rights are not diminished even in the most minimal manner, the decision has been taken to expropriate for purposes of public use the assets of the private credit institutions ...

Decree Which Establishes The Nationalization of Private Banks, September 1, 1982. Even if the reserve, reporting, and inspection requirements are adequate, none can ever prevent insolvency (49 banks have failed this year in the United States alone), nor is a valid substitute for deposit insurance.

The district court, moreover, found Mexican bank regulation both irrelevant to, and insufficient as a defense in, this case.

> Mexican bank deposits are not insured. Banamex urges that Mexican reserve, reporting and inspection requirements are as thorough as their American counterparts. Even if this is so, Weaver does not rest on the independent effect of such requirements on a

> depositor's risk; and to the extent Weaver invokes those requirements, it appears to emphasize their federal character ... Weaver thus does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case.
>
> Furthermore, plaintiff assumed not only the risk of Banamex's insolvency but also the much more substantial risk of a currency devalutation...
>
> In this case it is not contested that Mexico thoroughly regulates its banks and that no Mexican bank has become insolvent in fifty years. That is not enough, however, to make Wolf's investment virtually free of risk. Indeed, governmental regulation has no effect on the essential risk to which an investor in foreign time deposits is exposed -- the risk of devaluation. Because the rationale of Weaver is inapplicable here, the Court holds that plaintiff's time deposits were securities.

549 F. Supp. at 845, 853; appx. pp. 36, 58.

The Court of Appeals dismissed that reasoning by creating two mythical depositors it said would not have benefitted from federal bank regulation. But the court failed to address the right of early withdrawal permitting mitigation or elimination

of the risk of loss, the existence of deposit insurance eliminating the risk of bank failure, the fact there is no way federal bank regulation would have permitted the carnival promotion of these deposits to begin with, and the fact that any form of complete disclosure would have discouraged all such deposit-investments.

Contrary to Weaver's admonition, the Court of Appeals also failed to analyze and evaluate the instant transaction on the basis of

> the purposes intended to be served, and the factual setting as a whole.

Unlike Weaver, the instant transaction was part of an investment scheme, of international scope, designed and promoted by Banamex's Securities Department, the avowed purpose of which was to attract the investment of United States dollars into peso accounts. Undisputed are the district court's findings that Banamex

> ... advertised and promoted its accounts within the United States and dealt with plaintiff through the United States Postal Service ...

appx. p. 81; that

> ... [a]lthough the transaction took the form of a bank deposit, such deposits were promoted and widely solicited by Banamex as investments;

549 F.Supp. at 849; appx. p. 52; and that

> defendant has presented no colorable argument to support its private offering defense -- a defense which on its face is completely without merit in light of Banamex's general advertising of peso accounts and its distribution of brochures designed to solicit interest in those accounts.

This Court has previously found critical, as it repeated in Weaver,

> The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors ...

455 U. S. at 559. In the factual setting here were millions of offerees and an internationally disseminated brochure replete with omission and misrepresentation. Weaver was totally dissimilar; neither its

holding nor rationale apply. It is, after all, completely inconsistent with Weaver to exempt the deposit instruments of a foreign bank unregulated by United States banking laws from the requirements of the federal securities laws.

This Court's prior decisions establish that any instrument, taking traditional forms or not, when offered publicly as an investment and not specifically exempted from the federal securities laws, is a security. See, e.g., SEC v. C. M. Joiner Leasing Corp., 320 U. S. 344 (1943); SEC v. W. J. Howey Co., 328 U. S. 293 (1946); Tcherepnin v. Knight, 389 U. S. 332 (1967).

A fair reading of the Court of Appeals' own prior decisions, although purporting to apply a "risk-capital" test, also confirms that any instrument offered publicly as an investment is a security. See, e.g.,

SEC v. Glen W. Turner, Ent., Inc., 474 F.2d 476 (CA9 1973); El Khadem v. Equity Securities Corp., 494 F.2d 1224 (CA9 1974), cert. den., 419 U. S. 900; Safeway Portland v. C. H. Wagner & Co., Inc., 501 F.2d 1120 (CA9 1974); United States v. Carman, 577 F.2d 556 (CA9 1978); United States v. Farris, 614 F.2d 634 (CA9 1979), cert.den., 447 U. S. 926. See also, Great Western Bank & Trust Co. v. Kotz, supra; United California Bank v. THC Financial Corp., 557 F.2d 1351 (CA9 1977); Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (CA9 1978).

Except for its mistaken reliance upon Weaver, the Court of Appeals would have had to conclude that the deposit instruments at issue were indeed securities.

Both conflict and the potential for conflict exist between the Ninth Circuit and other Courts of Appeals on whether similar instruments are securities.

In Meason v. Bank of Miami, 652 F.2d 542 (CA5 1981), cert.den., 455 U. S. 939, the Fifth Circuit held that whether or not a foreign certificate of deposit was a security depended upon its investment character. There, plaintiffs purchased from a state bank (Bank of Miami) fixed term deposits in a sister bank (Popular) organized pursuant to the laws of the Grand Cayman Islands, British West Indies. Both banks were wholly owned subsidiaries of the same Florida holding company. Popular had insufficient funds with which to redeem the time deposits upon maturity. Meason said,

> The Bellah [v. First National Bank, 495 F.2d 1109 (CA5 1974)] court applied the commercial-investment

> dichotomy not only to notes but to certificates of deposit as well. Although the court found the investment characteristic lacking in the certificate of deposit at issue, it modified the dismissal of the suit to permit the plaintiffs to pursue the theory that the certificate of deposit was a security. 495 F.2d at 1114-16. See also Reid v. Hughes, 578 F.2d 634, 638 (5th Cir. 1978) (recognizing that "in certain situations a certificate of deposit can be a security as that term is used in the Act ...") ...
>
> This is not an ordinary banking transaction in which "currency" was deposited. Rather, a state chartered bank was allowing the sale of "term deposits" in a foreign bank to be sold on its premises by one of its officers ... [W]e remand so that appellants may attempt to demonstrate the investment character of their certificates of deposit.

As noted, this Court denied certiorari in Meason the same term it decided Weaver, 1982. Banamex's sales of its deposit instruments was of course far more widespread; it never even pretended to be promoting ordinary banking transactions; its sales literature instead proclaimed its deposits were nothing more than attractive

investments. The Fifth Circuit would have little difficulty holding that the investment character of Banamex's deposit instruments establishes them as securities.

In SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8 1973), the Eighth Circuit first noted,

> the deposits of First American are not insured by a governmental agency or private corporation;

then declared,

> It is not disputed that First American did offer to sell or in fact did sell through the use of the facilities of interstate commerce, capital notes, certificates of investment and passbook savings accounts. It is equally clear that for purposes of the Securities Act, these items are "securities".

The Eighth Circuit would have no difficulty holding that Banamex's uninsured deposit instruments sold through the mails were securities.

The Court of Appeals has decided this important question of first impression under the Securities Act of 1933 in a manner that is totally inconsistent with the plain meaning and obvious purposes of the Act.

It is completely inconsistent with the Securities Act of 1933 to exempt the deposit instruments of a foreign bank from the registration provisions of that Act, when the Congress that enacted it specifically exempted securities issued or guaranteed by domestic banks, but not those of foreign banks. Reenacted without change as recently as 1982, 15 U.S.C. §77c(a)(2) continues to provide,

> the term "bank" means any national bank, or any banking institution organized under the laws of any State.

See Public Law 97-261, September 20, 1982.

As declared in Reufenacht v. O'Halloran,

727 F.2d 320 (CA3 1984),

> When Congress wished to exempt a class of instruments from some or all of the [Securities] Acts' provisions, it had little trouble in doing so expressly.

In Securities Industry Association v. Board of Governors of the Federal Reserve System, 52 L.W. 4943 (June 28, 1984), this Court held,

> Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act ...,

stating,

> There is, moreover considerable evidence to indicate that the ordinary meaning of the terms "security" and "note" as used by the 1933 Congress encompasses commerical paper ... In each of these other statutes, the definition of the term "security" includes commercial paper, and each statute contains explicit exceptions when Congress meant for the provisions of an act not to apply ... The Securities Act of 1933, for example, defines the term "security" to include "any note."

Here, too, the deposit instruments fall within the plain language of the 1933 Act as "evidence of indebtedness" or "receipt" therefor, 15 U.S.C. §77b(1); their inclusion is fully consistent with the purposes for which the securities laws were enacted,

> the protection of investors, for the safeguarding of values, and so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation;

Sen. Rep. No. 792, 73rd Cong., 2d Sess. 2 (1934); and nowhere is there an exemption, explicit or implicit, for the securities, or evidences of indebtedness, of a foreign bank. Instead, quite the opposite is true.

Not only has the distinction between the instruments of domestic and foreign banks always existed in the 1933 Act, and not only has it been insufficient under the plain language of that Act to exempt an instrument from registration upon the grounds it was issued by a foreign bank,

albeit well-regulated, the registration provisions have always applied even to the issues of securities by foreign governments; see, 15 U.S.C. §77f(a), §77j(a)(2); see also, SEC v. Chinese Benevolent Assn., 120 F.2d 738 (CA2 1941)(Hand, J.),

> the provisions for registration statements apply to issues of securities by a foreign government [cit. om.].

Suddenly to exempt the instruments of a foreign bank that is wholly owned by a foreign government as Banamex is here, would be a logical absurdity.

Nor can the pretended safety allegedly provided by foreign regulation ever be a valid substitute for the domestic regulation and everyday supervision of a bank and its instruments pursuant to laws and by agencies created by Congress, that Weaver said made application of the securities laws there superfluous. As this Court noted in Securities Industry Ass'n.

v. Board of Governors of the Federal Reserve System, supra,

> We do not doubt that the risk of default with commercial paper is relatively low - lower perhaps than with many bank loans ... however, we find reliance on this characteristic misplaced ... there is little evidence to suggest that Congress intended the Act's prohibitions on underwriting to depend on the safety of particular securities ... the Act just prohibits commercial banks from underwriting any of them, with an exception for certain enumerated governmental obligations that Congress specifically has chosen to favor.

So too here; Congress has specifically chosen to favor domestic banks because Congress regulates them in other ways.

It is completely inconsistent with the recent amendments to the definitional sections of the federal securities laws to exempt from their application the deposit instruments at issue here. Interestingly, the Court of Appeals sought guidance there, but found none:

> We see little in the amendments or

> their legislative history to guide us in determining the outcome in the context before us.

739 F.2d 1462; appx. p. 21. Overlooked, or ignored, was that particular portion of those amendments that most nearly describes the instruments at issue here, and the legislative history pertinent thereto. First finding that

> Financial instruments designed to speculate on, or hedge against, fluctuations in interest rates and exchange rates, as well as stock market movements and other economic changes have proliferated,

1982 U. S. Code Cong. & Adm. News, page 2781 (emphasis added), Congress added to the definitions of a security,

> any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency.

15 U.S.C. §77b(1). Called a fixed-term peso account, what Banamex sold and Wolf bought for United States dollars were merely options on Mexican pesos: The privilege of selling a fixed number of

Mexican pesos at the rate of exchange that would prevail on a specific future date -- the dates each of the so-called "accounts" matured. Because he could neither use nor spend the pesos prior to maturity, Wolf became an unwitting speculator in the peso futures market without receiving any of the benefits of disclosure to which he was entitled under the federal securities laws. See, e.g., 17 C.F.R. §229.20, Item 11, Instruction 10; appx. p. 73,

> Foreign private registrants [which Banamex was at the times of sale and redemption here] should also discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors which have materially affected or could materially affect, directly or indirectly, company operations or investments by United States nationals.

These fixed-term peso accounts were nothing more and nothing less than "financial instruments designed to speculate on ... exchange rates". As such, they were precisely the kind of instrument subject to the registration as well as the antifraud

provisions of the securities acts, over which the Securities and Exchange Commission has always exercised jurisdiction, which exclusive jurisdiction the recent amendments were merely designed to confirm. See, 1982 U. S. Code Cong. & Adm. News, pages 2780 - 2789.

When Banamex's international advertising and promotional solicitations are considered, in particular its representations of governmental support for the peso when there can be no doubt it knew that support would cease at any moment (its Chairman was a member of the Advisory Board of the Banco de Mexico at and prior to the time it withdrew its support; Banamex produced previously published information of imminent devaluation at the summary judgment hearings in the disrtict court), the deposit instruments here absolutely demand securities law regulation.

The Court of Appeals has decided whether the deposit instruments here are securities under the Securities Act of 1933, in a manner directly contrary to the well established construction given that Act by the Securities and Exchange Commission.

As early as 1976, it was the unqualified position of the Securities and Exchange Commission that Mexican bank certificates of deposit, when offered or sold to United States citizens by means of solicitations in publications or sales literature distributed through the mails (as is undisputed here), were securities required to be registered under Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1), and that no exemption from registration was available with respect to such securities. Securities Act Release No. 5379, September 7, 1976; 10 SEC Docket 406. At that time, the Commission had reached an

apparent accord with the Mexican Government that would prohibit such activities by Mexican banks thereafter (see Release); obviously, it was ineffectual, and breached. See also, SEC v. Mexletter-Mexican Business & Investment Service, Civ. Act. No. 76-1660 (D.C.), Litigation Release No. 8021, July 8, 1977, 12 SEC Docket 1150.

It is also the Commission's unqualified position that certificates of deposit and similar instruments issued by banking organizations not subject to federal bank regulation are securities. See, e.g., SEC v. Maxwell E. Meek, Civ. Act. No. 81-227-T (W.D.Okla.), Litigation Release No. 9307, March 3, 1981, 22 SEC Docket 388; SEC v. Liberty Loan Corp., Civ. Act. No. 76-304c (E.D.Mo.), Litigation Release No. 7356, April 13, 1976, 9 SEC Docket 446; SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8 1973).

As the single agency entrusted by Congress to administer the federal securities laws, the Securities and Exchange Commission appeared as an amicus curiae in the Court of Appeals and advised it:

> ... the term "security" should not be construed to deny U. S. residents the protections of the securities laws in situations where time deposits that are unregulated by U. S. bank regulatory agencies are offered to the general public as investments.
>
> ... permitting foreign banks to sell their deposit instruments in this country without being subject to federal banking or securities regulation would be wholly inconsistent with Weaver.
>
> If the instruments are offered or sold to the general public on the representation that they are an attractive investment, they would be securities.

Brief of the Securities and Exchange Commission, Amicus Curiae, pp. 1, 11, 16, 17.

By ignoring, entirely, the Securities and Exchange Commission, the Court of Appeals failed to adhere to well-settled principles of law -- principles repeated most recently

in Chevron U.S A. Inc. v. Natural Resources Defense Council, ___U. S.___; 52 L.W. 4845, at 4847,

> "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." [cit.om.] ... We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [cits.om.] "... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." [cits.om.].

Here, both the formulation of policy and the construction given the statute by the Securities and Exchange Commission with

regard to the necessity for the registration as securities of the deposit instruments at issue, are completely consistent with the plain language of the Securities Act of 1933, and its legislative history.

As Judge Hand noted in SEC v. Chinese Benevolent Ass'n, supra, the Commission's

> ... effort is only to prevent the sale of Chinese securities through the mails without registry. If that can not be prevented, there is nothing to stop Germany, Italy, Japan, or any other nation, as well as China, from flooding our markets with securities without affording purchasers the information which the Securities Act intends to render available for investors in foreign bond issues.

Indentically, if the sale of investments in Mexican deposit instruments through the mails without registry cannot be prevented, nothing will stop the sale of similar instruments by every other bank in this hemisphere and beyond; indeed, the opinion of the Court of Appeals will encourage such activity and insulate it from SEC scrutiny.

The Court of Appeals has decided this important question of first impression in a way that also is inconsistent with and contrary to the International Banking Act.

The International Banking Act of 1978, 12 U.S.C. §3102, et seq., governs foreign bank participation in the domestic market by providing for the establishment here of regulated branches of foreign banks desirous of conducting legitimate banking business with United States citizens and residents. In particular, the Act requires that such banks must comply with the reserve, reporting, inspection, advertising, and all other requirements of United States banking laws (§3102(b)), subject themselves to domestic banking rules of insolvency (§3102(j)(1)), and offer deposit insurance (§3104).

12 U.S.C. §3102(b) provides,

> ... Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location...

12 U.S.C. §3102(j)(1) provides,

> ... or whenever the Comptroller shall become satisfied that such foreign bank is insolvent, he may ... appoint a receiver who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks ...

12 U.S.C. §3104(a) provides,

> No foreign bank may establish or operate a Federal branch which receives deposits of less than $100,000 unless the branch is an insured branch ...

Obviously, were the reserve, reporting, inspection and other requirements imposed upon foreign banks in their countries of origin deemed adequate by Congress for the

protection of United States' depositors, there would have been no need for this legislation; or, Congress could have provided an exemption for "well-regulated" foreign banks. Since it did not, the courts must not. Given the deliberate evasion of the International Banking Act by Banamex, Congress would indeed sanction the treatment of these deposit instruments as securities, because that is the only means of insuring that the buyers of such instruments are adequately informed.

To permit Banamex to sell its deposit instruments here without submitting to domestic regulation, as the International Banking Act requires, provides Banamex with a competitive advantage over domestic banks -- an advantage that Act was designed to curtail.

> The growth in number and size of foreign banking operations, and their ever-increasing importance to the

> structure of the banking system and to the functioning of money and credit markets has created the need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their activities in the United States ...
>
> [F]oreign banks enjoy many competitive advantages over our domestic banks. This bill establishes the principle of parity of treatment between foreign and domestic banks in like circumstances ...
>
> That U. S. banks are not in all cases afforded national treatment abroad presents a compelling reason not to grant foreign banks additional competitive advantages over domestic banks in the United States as well.

1978 U. S. Code Cong. & Adm. News, pages 1422, 1429.

Permitting Banamex to avoid federal securities regulation while it successfully evades federal banking regulation is doubly repugnant to the will of Congress, must not be permitted to continue, and obviously demands a national solution that the securities laws are specifically designed to provide.

The decision of the Court of Appeals will require lower federal courts to violate the act of state doctrine.

Although the offer and sale of the deposit instruments here were properly held to be commercial activities and therefore within the exceptions to both sovereign immunity and the act of state doctrine (appx. pp. 6-8; 80, 81), the decision of the Court of Appeals will require lower federal courts to conduct inquiries into the existence, enforcement and efficacy of the banking laws of sovereign foreign nations. It holds,

> ... [W]here a foreign government's regulatory structure is implicated, the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency ... [T]he bank shall bear the burden of proving such regulation, as an affirmative defense to a securities law charge. If the adequacy of the regulatory structure is proved, a certificate of deposit issued in a customary banking transaction is not, under Weaver, a security.

739 F.2d 1463; appx. p. 22. Any such inquiry, no matter its outcome, would be an intolerable intrusion by the judiciary into the internal affairs of a foreign nation expressly forbidden by the act of state doctrine. Vital still is the pronouncement of Underhill v. Hernandez, 168 U. S. 250 (1897),

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Reemphasized in Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398 (1964), none of this Court's more recent limitations on the doctrine, e.g., First National City Bank v. Banco Nacional de Cuba, 406 U. S. 759 (1972); Alfred Dunhill of London, Inc. v. Cuba, 425 U. S. 682 (1976), would preclude its application to foreclose absolutely any court adjudications of the

"adequacy" of a "foreign government's regulatory structure" which the Court of Appeals' decision would otherwise require. As First National City Bank, supra, stated,

> The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridicial review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.

And Alfred Dunhill, supra, repeated,

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

It is quite impossible to imagine more of an embarrassment to the conduct of foreign relations by this government with another whose regulatory structure's adequacy was at the same time being litigated in some federal district court. If other reasons, already expressed, were not so compelling, this alone would necessitate certiorari.

The Court of Appeals has decided an important, novel, federal question that has not been, but should be, settled by this Court.

Whether or not the deposit instruments at issue in this proceeding are finally held to be securities will determine as well the claims of many, many thousands of depositors throughout the country, pending in lower federal courts, and involving hundreds of millions of dollars.

In addition to individual actions in other circuits, three putative class actions, all stayed during the pendency of the instant proceeding, are pending in the United States District Court for the Northern District of California: Davies, et al. v. Banco Nacional de Mexico, S.A., #C 82 6978 WWS; Thompson, et al. v. Bancomer, S.A., #C 83 0155 WWS; and West, et al. v. Multibanco Comermex, S.A., #C 83 0174 WWS.

These three cases, although not yet certified as class actions, were brought on behalf of,

> ... all citizens and residents of the United States, all corporations incorporated within or under the laws of the United States, and all other entities having places of business within the United States, who purchased, renewed, owned or held a time deposit in the defendant bank within the period of any applicable statute of limitations (or who now or hereafter may purchase, renew, own or hold such account), to whom the defendant bank offered, sold, renewed, or otherwise dealt in or with such account by the use of any means or instruments of transportation or communication in interstate or foreign commerce or the mails.

The class actions present claims involving both investments in fixed term peso accounts and fixed term dollar accounts -- the latter alleging that these Mexican banks refused to repay the dollars when due, converted them to pesos at an artificial exchange rate substantially below the prevailing rate, thereby confiscating a major portion of those deposits. The opinion of the Court of

Appeals that the deposit instruments of a seemingly "well regulated" foreign bank will not constitute securities, could arguably apply to instruments evidencing investments in dollar accounts as well although it is utterly clear no reserve, reporting, nor inspection requirements will ever afford any protection whatsoever against confiscation.

CONCLUSION

For all of the reasons expressed, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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